No. 86-481

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Petitioners,

v.

WHITWORTH BROS. STORAGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did Congress, in enacting the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.*, authorize the federal courts to create, as a matter of federal common law, remedies in addition to the remedies explicitly provided by or properly implied from that statute; or did the decision of the Court of Appeals for the Sixth Circuit, by holding — in direct conflict with a decision of the Eleventh Circuit — that an employer has a common-law action for restitution of contributions made, allegedly by mistake, to an ERISA-governed employee benefit plan, violate the separation of powers among the branches of the federal government provided by the United States Constitution?

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EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Petitioners,

v.

WHITWORTH BROS. STORAGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners Central States, Southeast and Southwest Areas Pension Fund ("the Pension Fund"), the Pension Fund's Board of Trustees and Executive Director (all petitioners hereinafter collectively "Central States") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on June 25, 1986, which reversed the district court's dismissal of the complaint and remanded the case for further proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 794 F.2d 221 and is reprinted in the appendix to this petition at page 1a.

The memorandum decision and the memorandum and order upon motion for reconsideration or to alter or amend judgment of the United States District Court for the Northern District of Ohio (White, D. J.) have not been reported but are reprinted in the appendix to this petition at page 29a and page 34a, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 25, 1986. The court of appeals denied a timely petition for rehearing *en banc* on August 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The court below did not rely upon a statutory provision (other than the general preemption provision in ERISA § 514(a), 29 U.S.C. § 1144(a)) in holding that an employer has a federal-common-law action for restitution of contributions made, allegedly by mistake, to an ERISA-governed employee benefit plan; thus, it may be said that this case does not, within the meaning of Supreme Court Rule 21.1(f), "involve" any such provision. ERISA § 514(a) and the statutory provisions otherwise discussed in this petition, which are lengthy, have been reproduced in the appendix.

STATEMENT OF THE CASE

On September 15, 1983, Whitworth Bros. Storage Company ("Whitworth") filed a complaint against Central States seeking a refund of certain contributions made, allegedly by mistake, by Whitworth to the Pension Fund and a declaratory judgment that unpaid contributions were not owed by Whitworth. Specifically, Count I of the complaint alleged a right pursuant to § 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), to recover contributions made by Whitworth to the Pension Fund on behalf of William Whitworth and Ernest Whitworth after the effective date of ERISA; Count II was an allegedly pendent state-law claim for restitution of Whitworth's contributions for William Whitworth and Ernest Whitworth prior to the effective date of ERISA; Count III sought a declaratory judgment pursuant to 28 U.S.C. § 2201 that Ernest Whitworth is not covered by the collective bargaining agreement providing for contributions to the Pension Fund, that Whitworth is entitled to restitution plus interest of the payments made on Ernest Whitworth's behalf, and that Central States is not entitled to recover the unpaid contributions.

On November 6, 1984, Central States filed a motion, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint for lack of subject-matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted. The "facts" to be considered upon such a motion, and upon review of a decision granting such a motion, are the factual allegations pleaded in the complaint. The following relevant factual allegations from the complaint (some of which Central States denies, but which for the purposes of review must be deemed to be true), therefore, are the "facts" in this case:

> The Defendant Central States, Southeast and Southwest Areas Pension Fund (hereafter Central States or Pension Fund) is an employee benefit plan and multi-employer plan, as defined in 29 U.S.C. § 1002(2), (3) and (37)(A), established and maintained by "employers"

engaged in "commerce" and in an "industry and activity affecting commerce", and by an "employee organization" representing employees engaged in "commerce" and in an "industry and activity affecting commerce", within the meaning of 29 U.S.C. §§ 1002(4), (5), (11), (12) and 1003(a). Defendant Central States has maintained a Pension Fund for the benefit of Teamsters Union members from 1955 to the present. (Complaint at ¶ 2)

From 1955 to the present, William Whitworth was and is a co-owner, employee and officer (with authority to hire and fire employees) of Plaintiff Whitworth Bros. Storage Company. From 1955 to the present, Ernest Whitworth was and is a co-owner, employee and officer (with authority to recommend hiring and firing employees) of Plaintiff Whitworth Bros. Storage Company. (Complaint at ¶ 6)

Plaintiff made employer contributions to Central States for William Whitworth from January 1, 1975 through March, 1980, and for Ernest Whitworth from January 1, 1975 through July, 1981 in the mistaken belief that William Whitworth and Ernest Whitworth were employees covered by the collective bargaining agreement. The amount of said contributions is approximately $11,000.00. (Complaint at ¶ 10)

Plaintiff demanded recovery of such contributions to Central States. (Complaint at ¶ 11)

On July 23, 1981, Defendant Board of Trustees denied Plaintiff's request for recovery of erroneous contributions made on behalf of William Whitworth from January 1, 1975 through November 10, 1979. On July 24, 1981, Defendant Board of Trustees approved Plaintiff's request for recovery of erroneous contributions made on behalf of William Whitworth from November 11, 1979 through March 1, 1980. (Complaint at ¶ 12)

From 1955 through December 31, 1974, Plaintiff

made contributions to Central States for William Whitworth and Ernest Whitworth in the mistaken belief that William Whitworth and Ernest Whitworth were employees covered by the collective bargaining agreement. The amount of such contributions is approximately $9,000.00. (Complaint at ¶ 19)

Plaintiff has demanded recovery from Defendants of the erroneous payments for this period, but Defendant Board of Trustees has refused to review Plaintiff's claim for erroneous contributions from 1955 through May 30, 1964. On July 23, 1981, Defendant Board of Trustees denied Plaintiff's claim for recovery of erroneous contributions made on behalf of William Whitworth from May 31, 1964 through December 31, 1974. (Complaint at ¶ 20)

From August, 1981 through May, 1983, Defendant Central States billed Plaintiff in the amount of $1,701.86 purportedly for Plaintiff's employee's contribution for Ernest Whitworth. Plaintiff has refused to pay Central States because Ernest Whitworth is not covered by the collective bargaining agreement. (Complaint at ¶ 26)

After briefing on the motion was complete, the district court filed a memorandum and order on January 15, 1985, stating that "jurisdiction is predicated on 28 U.S.C. § 1331 and 29 U.S.C. § 1132e(1) [sic: (e)(1)] and (f)," noting that "[t]he issue in the case at bar is whether an employer may bring an action to recover overpayments to a pension fund," concluding that "employers have no cause of action," and therefore dismissing the counts alleging federal claims for lack of jurisdiction over the subject matter, and the pendent state-law claim as a matter of discretion. Appendix page 29a. Pursuant to that memorandum and order, the complaint was dismissed on January 22, 1985. Appendix page 33a.

On February 1, 1985, Whitworth filed a motion for reconsideration and to alter or amend the judgment as well as a motion for leave to file a first amended complaint. After the

completion of briefing on these motions, the district court filed a memorandum and order denying both motions on March 11, 1985. Appendix page 34a.

Whitworth filed a notice of appeal to the Court of Appeals for the Sixth Circuit on March 26, 1985. After briefing and oral argument, the court of appeals filed its opinion on June 25, 1986. In that opinion, the Sixth Circuit considered "whether the district court had jurisdiction of such a claim [by an employer for restitution of contributions made, allegedly by mistake, to an employee benefit plan] based on (1) the express actions recognized in ERISA; (2) an action implied from the terms of the statute; or (3) an action arising under federal common law." 794 F.2d at 224. The court of appeals answered the first two of these questions in the negative, holding that "section 502 is an exclusive grant of jurisdiction, and that ERISA does not expressly provide for an action by an employer against a fund for a refund of contributions," and that an employer has "no implied right of action pursuant to section 403." *Id.* at 228, 233. The Sixth Circuit went on, however, to characterize Whitworth's restitution claim as a "contract claim" and to hold that such a claim is governed by federal law because ERISA § 514(a), 29 U.S.C. § 1144(a), preempts state law relating to employee benefit plans and because the legislative history of ERISA indicates a congressional intent to develop a federal common law of such plans. *Id.* at 233-235. Based upon this holding, the court of appeals concluded that Whitworth's action for restitution is governed by federal common law and "arises under" federal law for the jurisdictional purposes of 28 U.S.C. § 1331. *Id.* at 236.

REASONS FOR GRANTING THE WRIT

Without the congressional authorization required by the principle of separation of powers among the branches of the federal government,[1] the Court of Appeals for the Sixth Circuit has created — in effect, legislated — a new remedy in addition to those remedies provided by Congress in ERISA. This decision directly conflicts with the decision of another federal court of appeals on the same matter, conflicts in principle with applicable decisions of this Supreme Court, creates disparate standards for administration of a national multiemployer employee benefit plan operating in different federal judicial circuits, and directly affects "the continued well-being and security of millions of employees and their dependents . . .," 29 U.S.C. § 1001(a).

The decision in the persent case directly conflicts with the decision of the Court of Appeals for the Eleventh Circuit in *Dime Coal Company, Inc.* v. *Combs*, 796 F.2d 394 (11th Cir. 1986), a case which is identical to the present one in all relevant factual respects. Dime Coal, an employer, was required by a collective bargaining agreement to make contributions, the amount of which was calculated by Dime Coal, to a pension fund on behalf of its employees. After learning that it made certain overpayments, Dime Coal requested a refund. The pension fund returned the larger part of the contributions requested but declined to refund the entire amount. Dime Coal then instituted its lawsuit.

The Eleventh Circuit held first, as did the Sixth Circuit in

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[1] With regard to this separation of powers, this Court has stated:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments — the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer* v. *Government of Philippine Islands*, 277 U.S. 189, 201, 48 S.Ct. 480, 72 L.Ed. 845; namely, to preclude a comingling of these essentially different powers of government in the same hands.

O'Donoghue v. *United States*, 289 U.S. 516, 530 (1933).

the present case, that "section 502(a) [of ERISA, 29 U.S.C. § 1132(a)] does not authorize contributing employers to bring any kind of civil suit at all," and that there is "no indication in the language of the statute or in its legislative history that Congress intended or would approve of the implication of the remedy" sought by the employer.[2] *Id.* at 397, 398. The court, after further consideration, also held — in direct conflict with the Sixth Circuit's decision in the present case — that "no federal common law right to recovery of the disputed contributions at issue in this case exists." *Id.* at 399 n.7. In so holding, the Eleventh Circuit correctly relied upon this Court's reasoning in *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, 451 U.S. 77 (1981), in which an assertion of a common-law remedy likewise was rejected: "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Id.* at 97.

The Sixth Circuit's decision in the present case therefore conflicts in principle with the decision of this Court in *Northwest Airlines*, and it also conflicts in principle with other applicable decisions of this Court regarding the circumstances under which the federal courts may create law that Congress has not seen fit to enact.

While the federal courts indeed have some power to formulate federal common law, this Court has consistently held that the need and authority to exercise such power occur only

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[2] It should be noted that the holdings of the Sixth and Eleventh Circuits that an employer has no implied right of action under ERISA § 403(c)(2)(A)(ii) agree with the decision of the Third Circuit in *Crown Cork and Seal Co., Inc.* v. *Teamsters Pension Fund of Philadelphia and Vicinity*, 549 F.Supp. 307 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983), and conflict with the Ninth Circuit's decision in *Award Service, Inc.* v. *Northern California Retail Clerks Unions and Food Employees Joint Pension Trust Fund*, 763 F.2d 1066 (9th Cir.), *motion to recall mandate denied*, 774 F.2d 1391 (9th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 850 (1986).

under limited circumstances, none of which exists in the present case. "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312 (1981) (citations omitted). This Court has repeatedly "emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is 'subject to the paramount authority of Congress.' " *Northwest Airlines*, 451 U.S. at 95, quoting *New Jersey* v. *New York*, 283 U.S. 336, 348 (1931). Federal common law "is resorted to 'in absence of an applicable Act of Congress,' . . . and because the Court is compelled to consider federal questions 'which cannot be answered from federal statutes alone. . . .' " *City of Milwaukee*, 451 U.S. at 314 (citations omitted). Thus, the instances in which the federal courts may create federal common law "are 'few and restricted,' . . . and fall into essentially two categories: [1] those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' . . . and [2] those in which Congress has given the courts the power to develop substantive law. . . ." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations omitted).

The first category recognized by *Texas Industries* is not applicable in the present case because, although Congress has chosen to uniformly regulate employee benefit plans and has enacted ERISA to do so, such federal regulation is merely "desirable," 29 U.S.C. § 1001(a), and such plans would *not* be "necessarily subject to federal control *even in the absence of statutory authority.*" *Id.* at 642 (emphasis added). Therefore, the validity of an exercise of power by a federal court to make federal common law with respect to such plans must be found in the second category recognized by *Texas Industries*, the granting of that power by the Congress.

This Court and a number of lower courts have recognized that, in enacting ERISA, Congress authorized the courts to fashion some limited federal common law with respect to the

regulation of employee benefit plans covered by the statute. Such federal common law is for the purpose of carrying out ERISA's legislative scheme, not to expand upon it. An example of the type of federal common law contemplated by Congress is the adoption by the federal courts of a standard for reviewing decisions of plan trustees. Thus, in actions brought to enforce a remedy expressly provided by ERISA (*e.g.*, by a participant to receive a pension), the courts have developed, using federal common law, the "arbitrary and capricious" standard of review. *See, e.g., Van Gunten* v. *Central States, Southeast and Southwest Areas Pension Fund*, 672 F.2d 586, 587 (6th Cir. 1982); *Wardle* v. *Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). Such federal common law is necessary to carry out ERISA's legislative scheme but does not create any additional remedies.

When the validity of the creation of federal common law is at issue, a critical consideration is whether such additional law is necessary to achieve the legislative goals. In *City of Milwaukee*, this Court held that "[f]ederal common law is a 'necessary expedient,' . . . and when Congress addresses a question previously governed by a decision resting on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 451 U.S. at 314. The Court went on to state that "[o]ur 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal" ' when Congress has addressed the problem." *Id.* at 315, quoting *TVA* v. *Hill*, 437 U.S. 153 at 195 (1978). Thus, after Congress has addressed an issue, it is unnecessary — indeed, improper — for a court to create or apply federal common law on that issue, whether or not such federal common law existed prior to the legislation.

Moreover, as the Court stated in *Northwest Airlines*: "The judiciary may not, in the face of such comprehensive

legislative schemes, fashion new remedies that might upset carefully considered legislative programs." 541 U.S. at 97 (footnote omitted). "The establishment of . . . a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *City of Milwaukee*, 451 U.S. at 319. This Court has specifically held that ERISA is such comprehensive legislation:

> The six carefully-integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."

Massachusetts Mutual Life Insurance Co. v. *Russell*, ___ U.S. ___, 105 S.Ct. 3085, 3093 (1985) (emphasis in original), quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

Further, not only did Congress leave out of ERISA's remedial provisions any cause of action for employers seeking restitution of contributions allegedly made by mistake, but it spoke directly to the issue in ERISA § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii), which, as a limited exception to the general rule of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1), that "the assets of a plan shall never inure to the benefit of any employer," allows return of a contribution if the plan administrator determines that a mistake was made and chooses to make a refund. In light of the merely permissive nature of this provision, section II.B. of the opinion in the present case correctly held that "[f]urther intervention on the part of the courts may implicate meddling in the administrator's exercise of his fiduciary duties." 794 F.2d at 233. This holding, however, is directly contradicted by the holding

in section II.C. of the opinion that Congress authorized *the courts* to create such a remedy.

This Court's decision in *Massachusetts Mutual* further confirms that Congress did not intend the courts to create federal-common-law remedies relating to ERISA-governed plans in addition to the remedies incorporated into the statute. In that case, where a beneficiary sought extra-contractual damages from a plan, the Court held that such a remedy was neither expressly provided by nor properly implied from the statute. The Court did not even suggest that a remedy might be fashioned as a matter of federal common law. The Court's analysis in *Texas Industries* also is illustrative. In that case, the Court first held that Congress neither expressly nor implicitly provided a right to contribution among antitrust co-conspirators, and then addressed the issue of whether recognition of a federal-common-law right to contribution would be appropriate. The Court concluded that the first two sections of the Sherman Act contained "sweeping language" and that it was Congress' "intent to allow courts to develop governing principles of law" with regard to those provisions. 451 U.S. at 643. However, the Court went on to hold that "[i]n contrast to the sweeping language of §§ 1 and 2 of the Sherman Act, the remedial provisions defined in the anittrust laws are detailed and specific," and, based upon that significant difference, it held that Congress had not authorized the federal courts to alter or supplement the remedies enacted. *Id.* at 644-645.

Of course, the fact that Congress, in enacting ERISA, did not intend for the federal courts to create additional causes of action relating to plans governed by the statute does not mean that Congress had no purpose in recognizing that some federal common law could be formulated.

> In almost any statutory scheme, there may be a need for a judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new

> rule or to provide a new remedy which Congress has decided not to adopt.

Northwest Airlines, 451 U.S. at 97 (citation omitted). Justice Brennan's concurring opinion in *Massachusetts Mutual*, which the court of appeals in the present case cited as authority for creating an employer's restitution remedy, recognizes that the legislative history of ERISA merely demonstrates that Congress intended federal courts to construe the remedies explicitly provided by the statute and "to develop federal common law in fashioning the . . . 'appropriate equitable relief' " called for by the statute. 105 S.Ct. at 3098.

The Sixth Circuit also relied upon legislative history of similar effect which was quoted by Justice Brennan in his concurrence, *id.*, and by the majority of the Court in *Franchise Tax Board of the State of California* v. *Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 24 n.26 (1983): "[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). Again, this language in no way authorizes the federal courts to create remedies in addition to those included in ERISA by Congress. Rather, as the Court explained in *Franchise Tax Board*, "the class of questions for which Congress intended that federal courts create federal common law" under ERISA involves such issues as "the meaning and enforceability of provisions in . . . [a] trust agreement. . . ." 463 U.S. at 26.

Review by this Court of the Sixth Circuit's decision is important because the decision infringes upon the legislative powers of Congress and also because the conflict between the circuits will create confusion in the administration of multiemployer plans that operate, as does the petitioner Pension Fund, across several federal judicial circuits. Because of this conflict of decisions, trustees may be required to refund contributions to an Ohio employer while permitted to deny a

refund to a Florida employer. Such disparate standards defeat the uniformity of treatment desired by Congress.

Finally, if allowed to stand, the decision below could have a detrimental effect on the financial stability of a significant number of pension funds and thus affect millions of individuals. Congress was keenly aware of this significant effect when it carefully crafted the remedial sections of ERISA and omitted the remedy created by the Sixth Circuit. ERISA § 2(a), 29 U.S.C. § 1001(a), states the following congressional findings and declaration of policy:

> The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; . . . that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; . . . and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

In fact, the Sixth Circuit itself recognized that "Congress, in weighing the interests implicated in the context of employee benefit plans, has favored the financial soundness of the plans and held employers to high standards of accounting." *Whitworth*, 794 F.2d at 236 n.24.[3]

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[3] The Sixth Circuit also noted that "limitations on the return of mistaken payments may seem at times inequitable," *Whitworth*, 794 F.2d at 236

> To impose a right to restitution in favor of employers could severely undermine the funds' integrity. Mistaken contributions, once invested, may be just as essential to the funds' integrity and stability as non-mistaken contributions. The statutory language itself recognizes this by allowing and not requiring a fiduciary to disgorge the funds. ERISA surely did not intend to impose the risk of mistaken contributions on the funds, particularly since the employer is in the best position to monitor the amount of its own contributions.

Crown Cork and Seal, 549 F.Supp. at 312.

In summary, the court of appeals' decision in this case not only greatly exceeds congressional authorization to formulate federal common law, contrary to the principle of separation of powers, but it also undermines Congress' intent to allow trustees to protect both the "financial soundness" of a "substantial" number of benefit plans and the "security of millions of employees and their dependents." As noted before, "[t]he judiciary may not . . . fashion new remedies that might upset carefully considered legislative programs," such as ERISA. *Northwest Airlines*, 541 U.S. at 97 (footnote omitted). The creation of a remedy relating to an ERISA-governed plan, such as an employer's action for restitution of contributions allegedly made by mistake, "is a matter for Congress, not the courts, to resolve." *Texas Industries*, 451 U.S. at 646.

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n.24, but this Court has held that "a favorable reaction to the equitable considerations supporting . . . [a] claim is not a sufficient reason for enlarging on the remedial provisions contained in . . . carefully considered statutes." *Northwest Airlines*, 541 U.S. at 98 (footnote omitted).

CONCLUSION

For all of the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

No. 85-3247

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WHITWORTH BROS. STORAGE COMPANY,
Plaintiff-Appellant,
v.
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed June 25, 1986

Before: ENGEL, CONTIE and MILBURN, Circuit Judges.

CONTIE, Circuit Judge. Whitworth Brothers Storage Co. (Whitworth) appeals from an order of the district court dismissing Whitworth's complaint filed pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii) against Central States, Southeast and Southwest Areas Pension Fund, its trustees and executive director for lack of subject-matter jurisdiction.[1] For the reasons that follow, the judgment of the district court is reversed.

[1] Defendants will hereinafter be referred to collectively as "Central States."

I.

On September 15, 1983, Whitworth filed a complaint against Central States alleging that Central States is a multi-employer employee benefit plan covered by ERISA. The complaint alleged that Whitworth was an Ohio corporation, that Central States was headquartered in and had its principal place of business in Illinois, and that since 1955 William and Ernest Whitworth have been employees, co-owners and officers of Whitworth. Count I alleged jurisdiction pursuant to 29 U.S.C. § 1132 (e)(1), and 28 U.S.C. § 1331. Whitworth styled the action as one "for recovery of Plaintiff's contributions to Central States on and after January 1, 1975 . . . pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii)," and claimed to have made $11,000 in contributions to Central States on behalf of William and Ernest in the mistaken belief that they were employees covered by the collective bargaining agreement. Payments were made on behalf of William from January 1, 1975 through July 1981 and on behalf of Ernest from January 1, 1975 through March 1980. Whitworth alleged that a request was made on Central States for return of such contributions, and that, on July 23, 1981, such request was denied with respect to payments from January 1, 1975 through November 10, 1979 on behalf of William, but granted with respect to payments from November 11, 1979 through March 1, 1980 on behalf of William. Whitworth alleged that the refusal to refund the payments was "arbitrary and capricious," and violated fiduciary duties pursuant to ERISA and 29 U.S.C. § 1104(a). The complaint was served on the Secretaries of Labor and of the Treasury. In Count II, Whitworth sought restitution pursuant to a state claim for contributions prior to January 1, 1975, alleging that $9,000 was paid on behalf of Ernest and William Whitworth from 1955 through December 31, 1974. Whitworth alleged that demand was made on Central States but that Central States had refused to review the claim for the period 1955 through May 30, 1964, and had denied the request for a refund of contributions made May 31, 1964 through December 31, 1974. Whit-

worth claimed that Central States' approval of the claim for the period November 11, 1979 through March 1, 1980 estopped Central States from denying Whitworth's claim and that such approval "constitutes a waiver to deny Plaintiff's claim." In Count III, Whitworth, invoking jurisdiction pursuant to 29 U.S.C. § 1132(e)(1), (f), 28 U.S.C. § 1331, sought a declaratory judgment that Ernest Whitworth is not covered by the collective bargaining agreement, that Whitworth is entitled to restitution plus interest of the payments made on Ernest's behalf from 1955 through July 1981, and that Central States is not entitled to contributions for the period August 1981 through May 1983. On Count I, Whitworth sought a refund of $11,000 plus pre-judgment interest and attorney's fees and costs pursuant to 29 U.S.C. § 1132(g), and on Count II, a refund of $9,000 plus interest and costs.

On November 6, 1984, Central States moved to dismiss for lack of subject-matter jurisdiction or, in the alternative, for failure to state a claim. On January 15, 1985, the district court dismissed the complaint for lack of subject-matter jurisdiction. The district court held that employers are not authorized to maintain an ERISA action pursuant to 29 U.S.C. § 1132(a), (e)(1).

> The Sixth Circuit has not specifically ruled on whether an employer may bring an action for recovery of mistaken payments to a pension fund under § 1103(c). The circuit has found that the benefit plan administrator determines whether a mistaken contribution was made and the trustees' action is conclusive unless arbitrary or capricious, not supported by substantial evidence, or erroneous on a question of law. *Transisters* [*sic*] *Local 348 Health and Welfare Fund* v. *Kohn Beverage Co.*, Nos. 83-3663, 83-3672 November 26, 1984 6th Circuit Court of Appeals. The Court noted that employers who pay mistaken contributions have no right of action or entitlement to a refund. *Id.* fn.6.

The district court concluded that ERISA provides employers

with no cause of action, and, therefore, dismissed Counts I and III, and dismissed Count II as a pendant claim. An order of dismissal was entered January 22, 1985.

On February 1, 1985, Whitworth moved for reconsideration and to alter or amend the judgment, and for leave to file an amended complaint. On March 11, 1985, the district court denied the motion based on the decision in *Kohn Beverage*, finding that "[t]he Sixth Circuit Court of Appeals did not hold that an employer may now bring an action under ERISA. In fact the Court noted that an employer who mistakenly makes a contribution to a pension fund has no cause of action for recovery." The district court found that Whitworth attempted to add William and Ernest Whitworth as individual plaintiffs to establish "standing as participants of the fund to file an action under ERISA." The court held that it could not grant the motion for leave until it first vacated the judgment, and concluded that even the amended complaint failed to state a cause of action, and, therefore, the grant of leave would be futile. "There is nothing in ERISA providing a cause of action by an employee to recover mistaken contributions to a plan by his employer."

II.

The essence of Whitworth's complaint is that Whitworth made contributions to Central States on behalf of its employees pursuant to written contracts, a trust agreement and a collective bargaining agreement, which Whitworth believed obligated it to make such payments. When Central States determined that certain of Whitworth's employees were not entitled to benefits, Whitworth concluded that it had made contributions which it was not contractually obligated to make, and, accordingly, sought restitution of the erroneously paid monies. Accordingly, we consider whether the district court had jurisdiction of such a claim based on (1) the express actions recognized in ERISA; (2) an action implied from the terms of the statute; or (3) an action arising under federal common law.

A.

The pertinent provisions of ERISA are reviewed below. 29 U.S.C. § 1132(e)(1) provides, with respect to jurisdiction, that:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Actions available under ERISA are defined in section 502(a), 29 U.S.C. § 1132(a):

> A civil action may be brought—
>
> (1) by a *participant* or *beneficiary*—
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> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the *Secretary*, or by a *participant*, *beneficiary* or *fiduciary* for appropriate relief under section 1109 of this title;
>
> (3) by a *participant*, *beneficiary*, or *fiduciary* (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> (4) by the *Secretary*, or by a *participant*, or

> *beneficiary* for appropriate relief in the case of a violation of 1025(c) of this title.

(Emphasis added).[2] It is clear that Whitworth, the plaintiff-employer in this case, is neither a "participant," 29 U.S.C. § 1002(7), "beneficiary," 29 U.S.C. § 1002(8), or "fiduciary," 29 U.S.C. § 1002(21). Accordingly, from the face of the statute it does not appear that Whitworth can premise jurisdiction on section 502(e), 29 U.S.C. § 1132(e).[3]

However, Whitworth further relies on section 403(c)(1), 29 U.S.C. § 1103(c)(1), which provides:

> Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), *the assets of a plan shall never inure to the benefit of any employer* and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(Emphasis added). An exception to this prohibition in subsection (c)(2)(A)(ii) provides:

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[2] 29 U.S.C § 1132(a)(5), (6) provides for actions by the Secretary of Labor. Subsection (d)(1) provides that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity." Subsection (d)(2) provides that "[a]ny money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter." Subsection (e)(2) provides for venue and subsection (g)(1) provides for attorney's fees and costs.

[3] In the context of ERISA's unique jurisdictional provisions, the questions of whether the court has jurisdiction and whether a party states a claim are intertwined. Section 502(e)(1) grants jurisdiction over actions brought pursuant to section 502(a). Accordingly, if a party states a claim pursuant to subsection (a), the court has jurisdiction pursuant to subsection (e). The converse also appears to be true. *See Crown Cork & Seal Co.* v. *Teamsters Pension Fund of Philadelphia*, 549 F. Supp. 307, 309 (E.D. Pa. 1982), *aff'd*, 720 F.2d 661 (3rd Cir. 1983).

> In the case of a contribution . . . made by an employer to a multiemployer plan by a mistake of fact or law . . ., paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.[4]

Whitworth, accordingly, argues that section 1103 provides an employer with an action for return of mistakenly paid contributions.

While courts generally agree that section 502 of ERISA does not provide for a civil action for employers as employers,[5] courts disagree regarding whether the grant of jurisidiction in section 502 is exclusive, thereby prohibiting an action by an employer such as Whitworth. In overpayment cases, such as the instant case, the Ninth Circuit has held that, despite the specific provisions of section 502, "an employer may bring an action under ERISA to enforce its terms where the employer alleges specific and personal injury." *Award Service, Inc.* v. *Northern California Retail Clerks Unions & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066, 1068 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 850 (1986). The court found that the district court had "jurisdiction to entertain the section 403 claim under 29 U.S.C. § 1132(e)" where "the employer alleges that it has

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[4] This subsection was amended in 1980. The statute, 29 U.S.C. § 1103(c)(2)(A), previously provided:

> In the case of a contribution which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution.

[5] This court and others have held, however, that an employer may maintain an action under ERISA when the employer falls within the statutory definition of a "fiduciary." *Great Lakes Steel* v. *Deggendorf*, 716 F.2d 1101, 1105 (6th Cir. 1983); *U.S. Steel Corp.* v. *Commonwealth of Pennsylvania Human Relations Commission*, 669 F.2d 124, 128 (3rd Cir. 1981). We have reached a similar conclusion with respect to a "plan," another party not specifically mentioned in section 502(a). *Saramar Aluminum Co.* v. *Pension Plan*, 782 F.2d 577, 581 (6th Cir. 1986). But see *id.* at 584 (Contie, J., concurring).

mistakenly paid more than $167,000 in contributions which it was not obligated to make." *Id.* (footnote omitted). The court in *Award Service* adhered to an earlier case holding that an employer could sue, pursuant to ERISA, a fund for failure to pay benefits, thereby impairing the employer's relationship with the union. *Fentron Industries, Inc.* v. *National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982). In *Fentron*, the court held that the jurisdictional grant of section 502 was not exclusive, and that "Fentron's alleged injuries also fall within the zone of interests that Congress intended to protect when it enacted ERISA." *Id.* at 1305. Further,

> we do not believe that Congress, in enacting ERISA, intended to prohibit employers from suing to enforce its provisions. The omission of employers from 29 U.S.C. § 1132 is not significant in this regard. There is nothing in the legislative history to suggest either that the list of parties empowered to sue under this section is exclusive or that Congress intentionally omitted employers. . . . In view of the intent of Congress to protect employer-employee relations, we hold that the statute does not prohibit employers from suing to enforce its provisions.

Id. (footnotes omitted).

Other courts have reached the opposite conclusion. In *Great Lakes Steel* v. *Deggendorf*, 716 F.2d 1101, 1105 (6th Cir. 1983), we held that "29 U.S.C. § 1132(e)(1) does not confer jurisdiction over an action brought by an employer as employer administering an employee health benefit program." Also at odds with *Fentron* is the Second Circuit's decision in *Pressroom Unions Printers League Income Security Fund* v. *Continential Assurance Co.*, 700 F.2d 889, 892 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983), in which the court, rejecting the *Fentron* analysis, declined to construe section 502 as allowing a fund or plan to maintain an action under ERISA. The court observed that "[i]t is beyond dispute that only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, and that courts

are not to infer a grant of jurisdiction absent a clear legislative mandate." *Id.* at 892. We "focus . . . on whether there is any indication that the legislature intended to *grant* subject matter jurisdiction over suits by employers, funds, or other parties not listed in § 1132(e)(1)." *Id.* Noting that the legislative history was silent, the court held that, "absent such expression, § 1132(e)(1) should be viewed as an exclusive jurisdictional grant." *Id.* (footnote omitted). The court further noted that it had previously held that "an employer, also not named in ERISA's jurisdictional provisions, may not bring suit under the Act." *Id. See Stone & Webster Engineering Corp.* v. *Illsley*, 690 F.2d 323, 326 (2d Cir. 1982), *aff'd*, 463 U.S. 1220 (1983). The Third Circuit has approved a similar result with respect to actions by an employer to recover excess contributions. "An action brought by an employer *qua* employer such as plaintiff is not included within the scope of this section [502]." *Crown Cork & Seal Co.* v. *Teamsters Pension Fund of Philadelphia*, 549 F. Supp. 307, 310 n.3, 311 (E.D. Pa. 1982), *aff'd*, 720 F.2d 661 (3d Cir. 1983) ("Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1) (1976) clearly restricts the categories of individuals empowered to bring a civil action to four groups of persons, none of which includes employers."). *See Hardy* v. *National Kinney of California, Inc.*, 571 F. Supp. 1214, 1215 (N.D. Cal. 1983) (section 502 is exhaustive respecting jurisdiction);[6] *Wong* v. *Bacon*, 445 F. Supp. 1177, 1183 (N.D. Cal. 1977) ("employers who contribute to employee benefit plans do not fit in any of the four limited categories of plaintiffs in § 502(e)(1).").

Courts have likewise resisted employers' attempts to bring actions pursuant to section 502 on grounds other than restitution of allegedly mistaken contributions. The courts have rejected employers' attempts to maintain actions for breach of fiduciary duty under ERISA. *Tuvia Convalescent Center* v. *National Union*, 717 F.2d 726, 729-30 (2d Cir. 1983) (follows *Pressroom*, rejects *Fentron*; "section 1132 does not provide

[6] In *Hardy*, the issue of return of excess contributions was raised by an employer's counterclaim responding to an action by trustees against the employer to collect delinquent contributions.

that a civil action may be brought by an employer"); *Modern Woodcrafts, Inc.* v. *Hawley*, 534 F. Supp. 1000, 1013 (D. Conn. 1982) (actions limited to parties enumerated in section 502); *Central States* v. *Admiral Merchants Motor Freight, Inc.*, 511 F. Supp. 38, 46 (D. Minn. 1980), *aff'd*, 642 F.2d 1122 (8th Cir. 1981) ("ERISA by its terms permits actions only by the Secretary of Labor and participants, beneficiaries, and fiduciaries of trust funds").[7] *But see Building Service Employees Pension Trust* v. *Horsemen's Quarter Horse Racing Ass'n*, 98 F.R.D. 458, 461 (N.D. Cal. 1983) (follows *Fentron*). *See also Niagara of Wisconsin Paper Corp.* v. *Paper Industry Union-Management Pension Fund*, 603 F. Supp. 1420, 1422 (D. Minn. 1984); *R. M. Bowler Contract Hauling* v. *Central States*, 547 F. Supp. 783, 784 (S.D. Ill. 1982). The courts have also restricted actions by parties, other than employers, who are also not among the parties enumerated in section 502. With respect to an action by a plan, *see Northeast Department ILGWU Health & Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147,

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[7] Courts have often discussed actions by employers under ERISA in terms of standing. *Award Service*, 763 F.2d at 1069; *Associated Builders & Contractors* v. *Carpenters Vacation & Holiday Trust Fund for Northern California*, 700 F.2d 1269, 1278 (9th Cir.), *cert. denied*, 464 U.S. 825 (1983); *Stone & Webster Engineering Corp.* v. *Ilsley*, 690 F.2d 323, 326 (2d Cir. 1982), *aff'd*, 463 U.S. 1220 (1983); *Gruber* v. *Hubbard Bert Karle Weber, Inc.*, 608 F. Supp. 392, 394 (W.D. Pa. 1985); *Blue Cross & Blue Shield of Kansas City* v. *Bell*, 596 F. Supp. 1053, 1058 (D. Kan. 1984); *Amalgamated Industrial Union Local 44-A Health & Welfare Fund* v. *Webb*, 562 F. Supp. 185, 187 (N.D. Ill. 1983); *Modern Woodcrafts*, 534 F. Supp. at 1012; *Michigan United Food & Commercial Workers Union* v. *Baerwaldt*, 572 F. Supp. 943, 947 (E.D. Mich. 1983), *rev'd on other grounds*, 767 F.2d 308 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 801 (1986). However, the standing question is certainly analytically distinct from the questions of failure to state a claim and lack of jurisdiction. "The standing doctrine limits the judicial power of the federal courts to parties who demonstrate 'injury in fact.' " *Allstate Insurance Co.* v. *Wayne County*, 760 F.2d 689, 692 (6th Cir. 1985). Pursuant to the standards set out in *Allstate* and the cases cited therein, it appears clear that an employer who mistakenly pays contributions on behalf of employees which he is not contractually obligated to pay is injured in fact by the trust fund's refusal to return the contributions, and, therefore, satisfies the requirements of the standing doctrine.

152-54 (3d Cir. 1985).[8] *See also Blue Cross & Blue Shield of Kansas City* v. *Bell*, 596 F. Supp. 1053, 1058 (D. Kan. 1984) ("the Tenth Circuit would adopt the position that § 1132 is an exclusive jurisdictional grant and that to sue for equitable relief under ERISA a plaintiff must be a participant, beneficiary or fiduciary"); *Amalgamated Industrial Union Local 44-A Health & Welfare Fund* v. *Webb*, 562 F. Supp. 185, 187 (N.D. Ill. 1983) (502 is exclusive grant of jurisdiction).

Unfortunately, no legislative history is determinative with respect to whether Congress intended section 502 to be an exclusive grant of jurisdiction. It is clear, however, that when Congress intended to provide a civil action for employers with respect to pension plans it knew how to do so. For instance, 29 U.S.C. § 1451(a)(1) provides:

> A plan fiduciary, *employer*, plan participant, or beneficiary, who is adversely affected by the act or omis-

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[8] In *Michigan United Food & Commercial Workers Union* v. *Baerwaldt*, 572 F. Supp. 943 (E.D. Mich. 1983), a fund sued the state insurance commissioner for a declaratory judgment that a state statute was preempted. The district court apparently found that jurisdiction existed pursuant to 28 U.S.C. §§ 1331, 1337, but also found that "ERISA gives plaintiffs an independent basis for suit." *Id.* at 946. The court noted that plans or funds are not among the parties enumerated in section 502 and held that

> [w]hile participants, beneficiaries, and fiduciaries who might otherwise not clearly have standing to bring suit in federal court to enjoin violations of the Act are the only parties addressed. I do not believe the provision's language should be read to exclude a non-fiduciary plan itself from suing for an injunction, and obtaining federal jurisdiction by presenting a question arising under ERISA.

Id. at 947. The court specifically approved the *Fentron* analysis, *id.* at n.7, while recognizing that its discussion of jurisdiction was unnecessary in light of the addition of the trustees to the action, giving rise to ERISA jurisdiction under section 502 since the trustees were fiduciaries, *id.* at n.6. In reversing on the preemption ground, we made no reference to the jurisdictional issue. 767 F.2d 308 (6th Cir. 1985). In light of this court's disposition of the case and the acknowledgement by the district court that jurisdiction was proper because of the addition of the trustees as proper parties, the *dicta* in *Baerwaldt* need not be given much deference. Additionally, we have previously indicated that the provisions of section 502 may be limiting. *Authier* v. *Ginsberg*, 757 F.2d 796, 801 n.9 (6th Cir.), *cert. denied*, 106 S. Ct. 208 (1985).

> sion of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(Emphasis added). Congress' failure to specifically mention the term "employer" in section 502 can, therefore, be construed as meaning that Congress intended to exclude employers from the provisions of that section.[9]

The Supreme Court of the United States has considered section 502 of ERISA. In *Franchise Tax Board* v. *Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983), an action by a state entity against a plan, the Court observed that

> [t]he express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties, . . . as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes. It did not go so far as to provide that any suit *against* such parties must also be brought in federal court when they themselves did not choose to sue.

Id. at 21 (footnote omitted). Further,

> [t]he phrasing of § 502(a) is instructive. Section 502(a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments, to enforce tax levies or for any other purpose. It does not purport to reach every question relating to plans covered by ERISA.

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[9] 29 U.S.C. § 1451(a)(1), (c) is inapplicable to this case, and not cited by the parties, since that section only creates an action based on acts or omissions under subtitle E, subchapter III, of the statute. Appellant apparently seeks to proceed under subtitle B of subchapter I. *See Saramar Aluminum Co.*, 782 F.2d at 51 n.3.

Id. at 25 (footnote omitted).[10] The Court concluded that

> ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Id. at 27 (footnote omitted).

Accordingly, the aforementioned authorities and the plain language of the statute make clear that Congress intended to limit the parties who could maintain actions pursuant to section 502, that section 502 is an exclusive grant of jurisdiction, and that ERISA does not expressly provide for an action by an employer against a fund for a refund of contributions. We consider below whether such an action can be implied from section 403 of the statute.

B.

This Circuit and the Supreme Court have often considered the implication of private rights of action.[11] "In evaluating such a claim, our focus must be on the intent of Congress when it enacted the statute in question." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 536 (1984); *Marx* v. *Centran*

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[10] The Court noted that section 502 is very different from section 301 of the LMRA. While section 502 limits claims and, thereby, jurisdiction, by reference to the particular party, relief sought, and nature of the action, section 301 is much broader. However, the Court noted that even the scope of section 301 is not unlimited. *Id.* at 25 n.28. Section 301 only requires reference to the contract in question to resolve the jurisdictional issue. That section grants jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter. . . ." *See Tuvia*, 717 F. 2d at 731; *Laborers Health & Welfare Trust Fund* v. *Kaufman & Broad of Northern California, Inc.*, 707 F.2d 412 (9th Cir. 1983); *Teamsters Local 639-Employers Health Trust* v. *Cassidy Trucking, Inc.*, 646 F.2d 865 (4th Cir. 1981).

[11] We have jurisdiction, under 28 U.S.C. § 1331, of course, to determine whether an implied right of action exists. *Award Service*, 763 F.2d at 1068.

Corp., 747 F.2d 1536, 1544 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2656 (1985); *Howard* v. *Pierce*, 738 F.2d 722, 724 (6th Cir. 1984).

> That intent may in turn be discerned by examining a number of factors, including the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the states in affording the relief claimed.

Daily Income Fund, 464 U.S. at 536. These "factors" have more traditionally been reviewed by the standards set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975):

> 1) Whether the plaintiff is a member of a class for whose especial benefit the statute was enacted?
>
> 2) Whether the legislative intent was to create or deny a remedy?
>
> 3) Whether it is consistent with the purposes of the legislative scheme to imply a remedy?
>
> 4) Whether the action is one traditionally relegated to state law?

Although these standards are only guides to discern legislative intent, *Marx*, 747 F.2d at 1544, our analysis proceeds along these lines, *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 105 S. Ct. 3085, 3092-94 (1985). "The starting point of the analysis is always the language of the statute," *Marx*, 747 F.2d at 1544, "particularly . . . the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent." *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981).

While the question of whether a statute benefits a particular class might appear simplistic, the Court has required

more than mere benefit to satisfy the first prong of the *Cort* test. *See Daily Income Fund*, 464 U.S. at 541; *Universities Research Ass'n* v. *Coutu*, 450 U.S. 759, 771 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979).[12] "[A] court must conclude not only that there is a specific class of beneficiaries, but also, that 'Congress intended to confer federal rights upon these beneficiaries.' " *Howard*, 738 F.2d at 724 (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)).

> The question whether a plaintiff is an intended beneficiary of a statute and the question whether a statute creates enforceable federal rights are related. Invariably, if a statute is found to establish a federal right in favor of the plaintiff, the plaintiff will be an "intended beneficiary" of the statute. However, the converse is not true necessarily.

Id. at 725. "[T]he inference that Congress intended to create legally enforceable rights is strongest when the statutory language focuses unmistakably on a specific and identifiable class of beneficiaries." *Id.* at 726. "Accordingly, an implied cause of action may be found when language in the pertinent statute expresses an 'unmistakable focus on the benefited class' of which plaintiff is a member." *Id. See Cort*, 422 U.S. at 82 ("clearly articulated federal right" or "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class" is required.). The Court has emphasized attention to the directness of the statutory language in question, *Marx*, 747 F.2d at 1545, where such "right- or duty-creating language" is explicit, *Cannon*, 441 U.S. at 690 n.13. Consistently, "the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large." *Id.* at 692. If the statute grants

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[12] The Court has emphasized that the mere "fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of the person." *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979).

a class certain rights, then a plaintiff need not necessarily proffer the legislative intent to create a cause of action. *Cort*, 422 U.S. at 82. However, where the legislative history evinces an intent to deny such cause of action, that intent is controlling. *Id.* Where the first *Cort* factor has not been satisfied, "the absence in the legislative history of an expressed intent to create a cause of action will be taken as an affirmative indication that none was, in fact, intended." *Marx*, 747 F.2d at 1546.

Further, when the statute specifically provides certain remedies the courts should not expand the statute to encompass other remedies. *Cort*, 422 U.S. at 82 n.14; *Marx*, 747 F.2d at 1545. However, when the proposed remedy is "necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Cannon*, 441 U.S. at 703 (footnote omitted).

The Ninth Circuit, while recognizing that "[s]ection 403 confers no such right expressly; it merely *permits* the return of contributions mistakenly paid," has held that section 403 of ERISA creates an implied right of action in favor of an employer. *Award Service*, 763 F.2d at 1068. First, the court concluded that the 1980 amendments to section 403 were "clearly designed for the benefit of employers." *Id.* With respect to the other *Cort* factors, the court found:

> Second, a congressional intent to create a private remedy in favor of the employer is implicit in Section 403(c)(2)(A)(ii). Without such a remedy, the decision to return contributions mistakenly paid would be left solely to the interested trustee. Third, implying a private right of action furthers the congressional scheme of permitting restitution of contributions paid by mistake when equitable factors militate in favor of such restitution. Finally, no principle of federal-state comity renders a federal cause of action inappropriate; Congress preempted all state law regarding employee pension benefits effective with contributions made after January 1, 1975.

Id. With respect to the nature of this implied right of action, the court held that the employer "will have to establish that the equities favor restitution" and that "[a] principal equitable consideration is whether restitution would undermine the financial stability of the plan." *Id.* at 1069; *Chase* v. *Trustees of Western Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 753 (9th Cir. 1985).[13]

Another court has reached the opposite conclusion. *Crown, Cork & Seal*, 549 F. Supp. at 311. The court reasoned:

> In this case, there is no evidence of Congressional intent to create a cause of action for restitution in favor of employers. Employers were not the group for whose especial benefit the statutory scheme was enacted. The statute specifically enumerates other private causes of action yet conspicuously does not list employers within the group of persons entitled to maintain a cause of action. ERISA and the 1980 MEPPA amendments were designed specifically to provide pension benefits for long-time employees and their beneficiaries. No Congressional intent can be discerned to benefit employers as a category.
>
> The legislative history of section 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii) (Supp. IV 1980) does not indicate that the expansion of the circumstances under which excess contributions could be returned to employers was intended to create a right to such contributions. The language of the statute itself is entirely permissive. It states merely that fiduciaries are not prohibited from returning to an employer contributions

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[13] *Chase* involved owner-operators of taxi-cabs. The court apparently avoided any difficult jurisdictional question pursuant to section 502(e) by concluding that the owner-operators were likely to be "participants," and, therefore, within the jurisdictional grant of section 502(e). *Id.* at 748-49. With respect to section 403, the court held that "[l]egitimate concerns about the stability of the trust fund can be resolved by only allowing restitution when the refund would not affect the fund's stability." *Id.* at 750. Further, the court did not indicate that any special deference be given the administrator's determination. *Id.* at 752.

made by mistake of fact or law. Congress apparently chose not to use the word "may," a word which might suggest, arguably, a direction to the trustees to take affirmative steps to determine and return mistakenly made contributions, or direction to the Secretary of Labor to promulgate implementing regulations. However, the use of the phrase, "are not prohibited" expresses an intent to allow, but not require the trustees to return contributions if they choose to do so, as an exception to their strict fiduciary duties to maintain the funds for the benefit of employees.

On its face then, the statute imposes no requirement on the trustees to return mistaken contributions. To impose such a requirement by implication would violate the underlying statutory scheme. ERISA's primary purpose is to protect the integrity of the pension funds for the benefit of employees and their beneficiaries. To that end, fund fiduciaries are strictly required to discharge their duties solely in the interest of the participants and beneficiaries. 29 U.S.C. § 1104. To impose a right to restitution in favor of employers could severely undermine the funds' integrity. Mistaken contributions, once invested, may be just as essential to the funds' integrity and stability as non-mistaken contributions. The statutory language itself recognizes this by allowing and not requiring a fiduciary to disgorge the funds. ERISA surely did not intend to impose the risk of mistaken contributions on the funds, particularly since the employer is in the best position to monitor the amount of its own contributions.

Id. at 311-12. *See Hardy* v. *National Kinney of California, Inc.*, 565 F. Supp. 1027, 1030 (N.D. Cal.), 571 F. Supp. 1214, 1215 (N.D. Cal. 1983).[14]

[14] The Tenth Circuit has apparently allowed an action by an employer in an overpayment case, although the basis of such action is unclear. *Peckham* v. *Board of Trustees of International Brotherhood of Painters & Allied Trades Union & Industry National Pension Fund*, 719 F.2d 1063, *modified*,

In *Teamsters Local 348 Health & Welfare Fund* v. *Kohn Beverage Co.*, 749 F.2d 315 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2024 (1985), an action premised on 29 U.S.C. § 185(a), we held that "[e]mployers who pay mistaken contributions have no right of action or entitlement to a refund." *Id.* at 321 n.6. *Kohn* was premised on section 301 of the LMRA, and we did not address the issue of the existence of an implied right of action under section 403 of ERISA.[15]

The Supreme Court has recently considered implied rights of action under another provision of ERISA. In *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 105 S. Ct. 3085 (1985), a beneficiary brought an action against the plan for improper

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724 F.2d 100 (10th Cir. 1983). In *Central States* v. *Wholesale Produce Supply*, 478 F. Supp. 884 (D. Minn.), *aff'd*, 611 F.2d 694 (8th Cir. 1979), in an action by trustees against an employer, the court allowed set-off by the employer of funds paid due to a clerical error. *See also Teamsters Pension Trust Fund* v. *Philadelphia Fruit Exchange*, 603 F. Supp. 877, 880-81 (E.D. Pa. 1985) (no right to set-off as a matter of law); *Niagara of Wisconsin Paper Corp.* v. *Paper Industry Union-Management Pension Fund*, 603 F. Supp. 1420, 1422 (D. Minn. 1984) (no implied right of action); *R. V. Cloud Co.* v. *Western Conference of Teamsters Pension Trust Fund*, 566 F. Supp. 1426, 1431 (N.D. Cal. 1983) ("it is doubtful that this section creates a private right of action;" "even if it does, the section does not create an entitlement of any kind; it is permissive only, and a refund may be granted or denied for equitable reasons"); *I. C. Ethridge* v. *Masonry Contractors, Inc.*, 536 F. Supp. 365, 368 (N.D. Ga. 1982) (decision of administrator not relevant; "an employer is entitled to the return of an overpayment where, within six months of its discovery, it demands the return of the overpayment"); *E. M. Trucks, Inc.* v. *Central States*, 517 F. Supp. 1122, 1124-25 (D. Minn. 1981) (while statute is permissive, administrator should not have complete discretion, but rather "payments must be refunded if equity so requires," which is a factual question); *Service Employees International Union Local 82 Labor-Management Trust Fund* v. *Baucom Janitorial Service, Inc.*, 504 F. Supp. 197, 198 (D. D.C. 1980) (employer entitled to offset); *Wong* v. *Bacon*, 445 F. Supp. at 1186 n.12 ("a court cannot infer a private cause of action from a statute which specifically enumerates other private causes of action in the absence of clear evidence of legislative intent").

[15] We held that the trustee's decision is conclusive unless arbitrary or capricious, not supported by substantial evidence, or erroneous on a question of law. *Id.* at 321. This limited review is proper since a trustee who returns contributions may, as a result, face an action for breach of fiduciary duty. *Justice* v. *Bankers Trust Co.*, 607 F. Supp. 527, 532 (N.D. Ala. 1985). *See also Electricians Health, Welfare & Pension Plans* v. *Gulino*, 594 F. Supp. 1265, 1271-72 n.15 (M.D. La. 1984).

refusal to pay benefits seeking extra-contractual damages pursuant to section 409(a) of ERISA, 29 U.S.C. § 1109(a).[16] The Court found, under *Cort* v. *Ash*, that the beneficiary was a party intended to be benefited by the Act and that state law did not bar the implied action due to ERISA's preemptive effect. *Id.* at 3092. The Court found, however, that Congress did not intend to authorize remedies other than those specifically listed in section 502. "We are reluctant to 'fine-tune' an enforcement scheme crafted with such evident care as the one in ERISA." *Id.* at 3093. Further,

> [t]he six carefully-integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."

Id.[17]

The legislative history of section 403, prior to the 1980 amendment, provided:

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[16] Section 409(a) provides in pertinent part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

[17] After *Russell*, the Ninth Circuit panel in *Award Service* published another opinion finding that *Russell* did not dictate a different result in that case. "There was no complex and interrelated system of express remedies in ERISA that related to such a claim. There was a positive indication by Congress that mistakenly paid contributions *could* be returned to the contributor." 774 F.2d 1391, 1392 (9th Cir. 1985). Further, "[t]hat remedy [section 403] was clearly enacted for the benefit of employers who mistakenly made payments to a fund, but there existed no express remedy to effectuate that congressional purpose." *Id.* at 1392.

> Since the assets of the employee benefit plan are to be held for the exclusive benefit of participants and beneficiaries, plan assets generally are not to inure to the benefit of the employer. However, the conference substitute allows an employer's contributions to be returned to him in certain limited situations.
>
> An employer's contributions can be returned within one year after they are made to the plan, if made as a mistake of fact. (For example, an employer may have made an arithmetical error in calculating the amounts that were to be contributed to the plan.) Also, if an employer contributes to a plan on the condition that the plan is tax-qualified or on the condition that a current tax deduction is allowed for the contribution, and it is later determined that the plan is not qualified (or the deduction is not allowed), the contribution can be returned if the plan provides for it. In this case, the contribution can be returned within one year after the disallowance of qualification or deduction.

H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5083.

With respect to the *Cort* factors, it appears clear that the statute was passed to benefit employees, not employers, despite the specific provision of section 403(c)(2)(A)(ii). It was the primary intent of Congress that employers not benefit from the assets of a plan. That an employer might benefit from that subsection does not establish a federal right and to so hold would ignore the thrust of ERISA and its purposes. Second, there is no indication of legislative intent to create a remedy other than that specifically set out in section 403. The administrator may return a contribution if the administrator finds that a mistake was made. Further intervention on the part of the courts may implicate meddling in the administrator's exercise of his fiduciary duties. Third, in light of section 502, it would be inconsistent with ERISA to imply a right of action. Fourth, the fact that regulating pension plans

is an area of peculiarly federal concern, does not require implication of a private right of action in favor of an employer. "Where the first three *Cort* factors indicate that no cause of action was intended, the mere fact that this legislation is in an area not traditionally relegated to state law cannot change this result." *Marx*, 747 F.2d at 1550.

Accordingly, Whitworth has no implied right of action pursuant to section 403.

C.

Whitworth also asserts that the district court had jurisdiction of this case under 28 U.S.C. § 1331 because Whitworth's contract claim for restitution is governed by federal common law.[18] This argument is premised on the assertion that the contract between the parties, the pension plan and incorporated provisions of the collective bargaining agreement, and the rights and remedies implicit therein or necessary to the enforcement thereof, are governed by federal law. Because ERISA's preemption provision and legislative history mandate application of federal law to Whitworth's contract, Whitworth's claims arise under federal law pursuant to 28 U.S.C. § 1331.

29 U.S.C. § 1144(a) provides in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws *insofar as they may now or hereafter relate to any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

(Emphasis added). The purpose of this broad preemption provision is "to provide for a uniform source of law." H.R.

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[18] Jurisdiction over Whitworth's declaratory judgment action is not established by the fact that such action is premised on interpretation of a federal defense, 29 U.S.C. § 1103(c)(2)(A), to Whitworth's action. *Franchise Tax Board*, 463 U.S. at 14.

Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4655. In considering the preemption issue, the key question remains Congress' intent in enacting the statute. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). In *Shaw*, the Court held that the phrase "relates to" is to be construed in the broadest sense. *Id.* at 98. "A law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan." *Id.* at 96-97 (footnote omitted). The Court noted that the original preemption provision in the statute was narrow and was broadened to cover more than "state laws relating to the specific subjects covered by ERISA." *Id.* at 98. However, some state laws "may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Id.* at 100 n.21.[19]

While the Supreme Court has distinguished the preemption issue in ERISA and LMRA cases,[20] preemption under section 301 of the LMRA is instructive in examining ERISA. The Court has held that

> the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. . . . [I]f a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax Board v. *Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983) (footnote omitted). In *Allis-Chalmers* v. *Lueck*,

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[19] Likewise, in the context of section 301 of the LMRA, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Allis-Chalmers Corp.* v. *Lueck*, 105 S. Ct. 1904, 1911 (1985).

[20] *Allis-Chalmers Corp.* v. *Lueck*, 105 S. Ct. 1904, 1916 (1985).

105 S. Ct. 1904 (1985), the Court held that section 301 preempted a state claim for bad faith handling of an insurance claim by the plaintiff's employer and insurer. State law contract claims are preempted "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 1916. The Court focused on whether state law "confers non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state law] claim is enextricably intertwined with consideration of the terms of the labor contract." *Id.* at 1912.

In this case, Whitworth's claim is that both plaintiff and defendant Central States are parties to, and are bound by the terms of, the trust agreement and the provisions of the collective bargaining agreement incorporated therein. Whitworth claims to have made payments to Central States in excess of Whitworth's contractual obligations, and claims that, in light of those specifically delineated obligations, equity requires the refund of overpayments. Consideration of this claim inevitably requires interpretation of the documents executed by the parties and the provisions made therein for payment and refund of contributions. It is uncontested that the benefit plan in question is covered by ERISA, and it is likewise clear that Whitworth's claim "relates to" such plan. Accordingly, it is clear that federal, and not state, law applies to Whitworth's claim based on the contracts between the parties. This conclusion is buttressed by judicial interpretation of the legislative history and ERISA's preemption provision.

We have held that ERISA's preemption provision in light of the legislative history[21] and purpose "was intended to create a body of federal substantive law regulating pension plans,"

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[21] *See* H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5107 ("All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947"); S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S Code Cong. & Ad. News 4865.

Authier, 757 F.2d at 799 n.5, to make "enforcement of ERISA solely a federal concern," *id.* at 801, and "to establish a uniform federal law regulating pension plans," *id.* at 802; *Franchise Tax Board*, 463 U.S. at 20-26.[22] "The legislative history demonstrates that Congress intended federal courts to develop federal common law in fashioning" relief under ERISA. *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 105 S. Ct. 3085, 3097 (1985) (Brennan, J., concurring); *Saramar*, 782 F.2d at 584 (Contie, J., concurring); *Amato* v. *Western Union International, Inc.*, 773 F.2d 1402, 1419 (2d Cir. 1985), *cert. dismissed*, 54 U.S.L.W. 3600 (February 26, 1986); *Kohn Beverage*, 749 F.2d at 319 n.5; *Thornton* v. *Evans*, 692 F.2d 1064, 1079 (7th Cir. 1982); *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966, 972-73 (5th Cir. 1981) ("The legislative history of ERISA indicates that this section was intended to create a federal common law concerning pension rights, which would augment the rights created by ERISA's substantive provisions."); *Murphy* v. *Heppenstall Co.*, 635 F.2d 233, 237 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982) ("In enacting ERISA, Congress authorized the evolution of a federal common law of pension plans."); *Hayden* v. *Texas-U.S. Chemical Co.*, 557 F. Supp. 382, 385 (E.D. Tex. 1983); *Corley* v. *Hecht Co.*, 530 F. Supp. 1155, 1163 (D.D.C. 1982); *Gilliam* v. *Edwards*, 492 F. Supp. 1255, 1261 (D.N.J. 1980); *M & R Investment Co.* v. *Fitzsimmons*, 484 F. Supp. 1041, 1056 (D. Nev. 1980), *aff'd*, 685 F.2d 283 (9th Cir. 1982); *Wong* v. *Bacon*, 445 F. Supp. 1177, 1185 (N.D. Cal. 1977) ("This federal law may supersede state law to the extent state law authorizes restitution from employee benefit plans under all circumstances. Section 502(a)(2) gave the federal courts a role to play in the

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[22] The Court in *Franchise Tax Board* noted that an action pursuant to section 502(a)(3) "is exclusively governed by federal law," *id.* at 20 (footnote omitted), that " 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans,' " *id.* at 24 n.26, and referred to "the class of questions for which Congress intended that federal courts create federal common law," *id.* at 26 (footnote omitted).

development of this federal law of restitution from ERISA trusts."); *In re C. D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1131 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1273 (3d Cir. 1978). "The source of this law must be the policies underlying ERISA." *In re C. D. Moyer Co. Trust Fund*, 441 F. Supp. at 1131.

This directive to fashion a federal common law governing pension plans is analogous to the directive with respect to collective bargaining agreements embodied in 29 U.S.C. § 185.

> [ERISA, like] [t]he Labor Management Relations Act [,] expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

Textile Workers Union of America v. *Lincoln Mills*, 353 U.S. 448, 457 (1957). *See also Allis-Chalmers*, 105 S. Ct. at 1911.

Other courts have recognized that the preemption of state law by ERISA and the congressional directive to develop a federal common law of employee benefit plans require application of federal law to actions premised on the contractual obligations created by ERISA plans. *See Northeast Department ILGWU*, 764 F.2d at 154-59; *Teamsters Local 639-Employees Health Trust* v. *Cassidy Trucking, Inc.*, 646 F.2d 865, 868 (4th Cir. 1981) (action for restitution); *Airco Industrial Gases* v. *Teamsters Health & Welfare Pension*

Fund, 618 F. Supp. 943 (D. Del. 1985);[23] *Teamsters Pension Trust Fund* v. *Philadelphia Fruit Exchange*, 603 F. Supp. 877 (E.D. Pa. 1985);*E. M. Trucks, Inc.* v. *Central States, Southeast & Southwest Areas Pension Plan*, 517 F. Supp. 1122 (D. Minn. 1981). *See also Peckham* v. *Board of Trustees*, 719 F.2d 1063, *modified*, 724 F.2d 100 (10th Cir. 1983); *Wong*, 445 F. Supp. at 1186 n.12. *But see Amato*, 773 F.2d at 1419; *Crown Cork & Seal*, 549 F. Supp. at 312 n.6. We join these courts in recognizing that contract claims like Whitworth's are governed by federal law.[24]

It is clear that Whitworth's claim, governed by federal common law, arises under federal law for the purposes of 28 U.S.C. § 1331. In *Illinois* v. *City of Milwaukee*, 406 U.S. 91

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[23] In *Airco Industrial Gases* v. *Teamsters Health & Welfare Pension Fund*, 618 F. Supp. 943 (D. Del. 1985), an employer brought an action to recover contributions mistakenly paid to the fund pursuant to 29 U.S.C. § 185, § 1103, and Delaware law. The court found that no action pursuant to § 185 was stated since the contract did not refer to mistaken payments, *id.* at 946, that § 502 of ERISA is an exclusive grant of jurisdiction, and that no implied right of action is available pursuant to 29 U.S.C. § 1103, *id.* at 947-48. The court held however that plaintiff was not precluded from recovering "because plaintiff does have a right of action under the federal common law for unjust enrichment." *Id.* at 950 (footnote omitted). Expressed differently, courts are authorized to create federal common law governing an employer's right of restitution when the provisions of ERISA preempt the state law of restitution. "Congress' intent in enacting ERISA and MPPAA was to preempt state law and authorize the federal court to fill in the interstices of the statutes. An action for unjust enrichment, equitable in nature, and developed in light of the policies of ERISA is appropriate." *Id.* at 951.

[24] 29 U.S.C §§ 1103, 1132 express Congress' intent not to favor employers and other parties not named in the statute with a federal statutory cause of action. However, the specific language of the statute, section 403(c)(2)(A)(ii), evinces congressional intent not to completely preclude employer recovery of mistakenly paid contributions. Whitworth's claim is, of course, expressly limited by the terms of ERISA set out in section 403(c)(2)(A) and by the terms of the agreement between the parties. Further, we adhere to the standards set out in *Kohn Beverage* which limit our review of the Fund administrator's denial of a refund of contributions. While such limitations on the return of mistaken payments may seem at times inequitable, Congress, in weighing the interests implicated in the context of employee benefit plans, has favored the financial soundness of the plan and held employers to high standards of accounting.

(1972), the Court squarely held that "§ 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin." *Id.* at 100. Thus, since Whitworth's action for restitution is governed by federal common law, it "arises under" federal law for purposes of § 1331. Accordingly, the district court erred in concluding that it had no jurisdiction over the case. *See Northeast Department ILGWU*, 764 F.2d at 154-59.[25]

Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

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[25] It appears clear, pursuant to the standards set out in *Crews* v. *Central States*, 788 F.2d 332 (6th Cir. 1986) and *Kohn Beverage*, that Whitworth has stated a claim for restitution sufficient to withstand a motion pursuant to Fed. R. Civ. P. 12(b)(6). Whitworth has alleged that (1) Whitworth paid contributions to defendant Central States which Whitworth was not obligated to pay pursuant to the collective bargaining agreement and trust agreement entered into by the parties; (2) Whitworth requested refund of the contributions; (3) Central States denied the refund; and (4) such refusal by Central States was arbitrary and capricious.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C83-3741

WHITWORTH BROS. STORAGE COMPANY,
Plaintiff,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,
Defendants.

MEMORANDUM AND ORDER

(Filed January 15, 1985)

Plaintiff brings this action for recovery of contributions mistakenly made to the Central States, Southeast and Southwest Areas Pension Fund. It is alleged that employer contributions were made to the Pension Fund for William Whitworth from January 1, 1975 through March 1980 and for Ernest Whitworth from January 1, 1975 through July 1981 in the mistaken belief that they were employees covered by the collective bargaining agreement. Demand was made for recovery of such contributions. The Board of Trustees denied the request for return of payments for Ernest Whitworth and partially denied the demand for payments concerning William Whitworth. The complaint also contains a state pendant claim for restitution and a claim for declaratory judgment concerning a bill from the Pension Fund for contributions for Ernest Whitworth. The Court's jurisdiction is predicated on 28 U.S.C. § 1331 and 29 U.S.C. § 1132e(1) and (f).

The defendants have moved the Court to dismiss the action

for lack of jurisdiction over the subject matter pursuant to Rule 12(b)(1) of the Fed. R. Civ. P. or in the alternative on the ground that the complaint fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Defendants contend that an employer is not authorized to bring an action under the Employees Retirement Income Security Act (ERISA).

29 U.S.C. § 1132(a) sets forth who may bring an action under ERISA. It includes participants, beneficiaries, fiduciaries or the Secretary. Employers are not mentioned. 29 U.S.C. § 1132(e)(1) provides in which courts such actions may be brought. The same individuals or entities are included.

In *Great Lakes Steel, Division of National Steel Corp.* v. *Deggendorf*, 716 F.2d 1101 (6th Cir. 1983), the Court allowed an empolyer to file an ERISA suit although ERISA did not confer jurisdiction over an action brought by an employer. The Court affirmed the district court's decision that an employer administering an employee health benefit plan has no standing under ERISA but held that the employer could file the action in its capacity as fiduciary, one of the individuals named in the act.

The issue in the case at bar is whether an employer may bring an action to recover overpayments to a pension fund. 29 U.S.C. § 1103(c)(1) and (2)(A)(ii) provide:

> (1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.
>
> (2) A In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E. of subchapter III of this chapter-(ii) made by an employer to a multiemployer plan by a mistake of fact of law (other

> than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

Several courts have allowed employers to proceed with actions under ERISA. *Fentron Industries, Inc.* v. *National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982), *Ethridge* v. *Masonry Construction, Inc.*, 536 F. Supp. 365, (N.D. Ga. 1982), *E.M. Trucks* v. *Control States, Southeast and Southwest Areas Pension Fund*, 517 F. Supp. 1122 (D. Minn. 1981).

In *Fentron* the Court found that when alleged injuries to an employer fell within the interests that Congress intended to protect, § 1132 and the legislative history of ERISA did not intend that the list of those authorized to sue was exclusive or that Congress intentionally omitted employers.

This case was criticized in *Tuvia Convalescent Center, Inc.* v. *National Union of Hospital and Health Care Employees*, 717 F. 2d 726 (2nd Cir. 1983), and *Pressroom Unions-Printers League, Income Security Fund* v. *Continental Assurance Co.*, 700 F.2d 889 (2nd Cir. 1983). The Second Circuit held that the legislative history reveals that Congress intended to prevent actions by employers and focused instead on whether the legislature intended to grant subject matter jurisdiction over suits by employers. The Court concluded that the legislative history is silent on both these questions. Therefore § 1132(e)(1) should be viewed as an exclusive jurisdictional grant.

The Sixth Circuit has not specifically ruled on whether an employer may bring an action for recovery of mistaken payments to a pension fund under § 1103(c). The circuit has found that the benefit plan administrator determines whether a mistaken contribution was made and the trustees' action is conclusive unless arbitrary or capricious, not supported by

substantial evidence, or erroneous on a question of law. *Transisters Local 348 Health and Welfare Fund* v. *Kohn Beverage Co.*, Nos. 83-3663, 83-3672 November 26, 1984 6th Circuit Court of Appeals. The Court noted that employers who pay mistaken contributions have no right of action or entitlement to a refund. *Id.* fn 6.

The majority of the cases seem to hold that ERISA does not allow an action by an employer. The Court agrees that in the absence of specific authorization of the right of employers to file ERISA actions, employers have no cause of action. See *Kann* v. *Keystone Resources, Inc.*, 575 F. Supp. 1084 (W.D. Pa. 1983) *R.V. Cloud Co. Inc.* v. *Western Conference of Transisters Pension Trust Fund*, 566 F. Supp. 1426 (N.D. Cal. 1983), *Hardy* v. *National Kinney of California, Inc.*, 565 F. Supp. 1027 (N.D. Cal. 1983).

Count II is a state pendant claim for restitution. Pendant jurisdiction is a doctrine of discretion, not of right. *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966). Since plaintiff's claims under ERISA will be dismissed the Court will exercise its discretion and dismiss the pendant claim under Count II.

Accordingly, Count I and Count II of the complaint are dismissed for lack of jurisdiction over the subject matter. Count II is dismissed pursuant to the Court's authority under *United Mine Workers of America* v. *Gibbs*, supra.

IT IS SO ORDERED.

George W. White
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C83-3741

WHITWORTH BROS. STORAGE COMPANY,
Plaintiff,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,
Defendants.

ORDER

(Filed January 22, 1985)

Pursuant to the Court's Memorandum and Order filed January 15, 1985,

IT IS ORDERED that plaintiff's complaint is hereby dismissed at plaintiff's costs.

George W. White
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C83-3741

WHITWORTH BROS. STORAGE COMPANY,
Plaintiff,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,
Defendants.

MEMORANDUM AND ORDER

(Filed March 11, 1985)

This matter is before the Court upon plaintiff's motion for reconsideration and to alter or amend judgment and motion for leave to file first amended complaint. On January 15, 1985 the Court ruled that the plaintiff employer did not have a cause of action under the Employee Retirement Income Security Act (ERISA) to recover overpayments to a pension fund. One of the cases cited in the Court's opinion on this point of law was *Teamsters Local, 348 Health & Welfare Fund* v. *Kohn Beverage Co.*, 749 F.2d 315 (6th Cir. 1984). Plaintiff bases its motion for reconsideration on an interpretation of this case. In *Kohn Beverage* the employer was the defendant that was sued for violation of a collective bargaining agreement and for failure to contribute to the employee benefit plan. An issue in the case was whether the Health & Welfare Fund Trustee's decision that no mistaken contributions were made and that the employer owed contributions was arbitrary or contrary to law. The Sixth Circuit Court of Appeals did not hold that an employer may now bring an ac-

tion under ERISA. In fact the Court noted that an employer who mistakenly makes a contribution to a pension fund has no cause of action for recovery. *Teamsters Local 348 Health & Welfare Fund* v. *Kohn Beverage Co., supra*, at 321 fn 6. Plaintiff has not raised any arguments that have not been previously raised to convince the Court to change its opinion. Therefore the motion for reconsideration or to alter or amend judgment is OVERRULED.

The plaintiff has also moved the Court for leave to file an amended complaint adding William Whitworth and Ernest Whitworth as new party plaintiffs. The Whitworths are persons on whose behalf the alleged mistaken contributions were made. They may have standing as participants of the fund to file an action under ERISA.

It has been held that the Court has no authority to consider a motion for leave to file an amended complaint after judgment or dismissal unless it first alters, vacates, or sets aside the judgment or order under Rule 59 or 60(b). *Bishop* v. *Lane*, 478 F. Supp. 865, (E.D. Tenn. 1978), *Roque* v. *City of Redlands*, 79 F.R.D. 433 (C.D. Calif. 1978).

Even if the Court could consider the motion for leave to amend the complaint, the addition of new parties still does not allow for a cause of action. There is nothing in ERISA providing a cause of action by an employee to recover mistaken contributions to a plan by his employer. As stated in the previous opinion the ERISA statutes set forth who can bring what type of action. Where the amendment would be futile the Court may deny leave to file an amended complaint. *Mazzare* v. *Burroughs Corp.*, 473 F. Supp. 234 (E.D. Pa. 1979), *Roque* v. *City of Redlands*, *supra*.

Accordingly, the motions for reconsideration and to alter or amend and for leave to file an amended complaint are OVERRULED.

IT IS SO ORDERED.

George W. White
U. S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 85-3247

WHITWORTH BROS. STORAGE COMPANY,
Plaintiff-Appellant,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND, et al.
Defendants-Appellees.

JUDGMENT

(Filed June 25, 1986)

Before: ENGEL, CONTIE and MILBURN, Circuit Judges.

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded for further proceedings consistent with this opinion.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER
OF THE COURT

Issued as Mandate:

/s/ JOHN P. HEHMAN, Clerk

COSTS:

Filing fee . . . . . $
Printing . . . . . $

Total . . . . . $

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 85-3247

WHITWORTH BROS. STORAGE COMPANY,
Plaintiff-Appellant,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND, et al.
Defendants-Appellees.

ORDER

(Filed August 26, 1986)

Before: ENGEL and MILBURN, Circuit Judges, and CONTIE* Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

* Judge Contie took senior status on July 1, 1986.

STATUTORY PROVISIONS

Employee Retirement Income Security Act of 1974 § 2(a), 29 U.S.C. § 1001(a)

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees

and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

Employee Retirement Income Security Act of 1974 § 403(c)(1), 29 U.S.C. § 1103(c)(1)

Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Employee Retirement Income Security Act of 1974 § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii)

In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

. . . made by an employer to a multiemployer plan by mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

Employee Retirement Income Security Act of 1974 § 502(a), 29 U.S.C. § 1132(a)

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Employee Retirement Income Security Act of 1974 § 514(a), 29 U.S.C. § 1144(a)

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

86-481

No. _____

Supreme Court, U.S.
FILED
OCT 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Petitioners,
v.
WHITWORTH BROS. STORAGE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where pension plan trustees have arbitrarily and capriciously refused to refund monies mistakenly contributed by a corporate employer on behalf of its co-owner employees, although ERISA expressly permits the Trustees to refund such contributions, and the Sixth Circuit Court of Appeals has ruled that such an employer has a federal common law cause of action to recover such mistaken contributions and prevent unjust enrichment, should this court grant Certiorari to review the Court of Appeals' ruling on that issue?

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PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as in the Courts below and are all set forth in the caption of the pleadings herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 749 F.2d 221. That opinion and the District Court's memorandum and orders are both reprinted in appendix to Central States' petition, respectively at pages 1a - 28a and 29a - 32 a.

STATEMENT OF THE CASE

William and Ernest Whitworth were and are co-owners and employees of Whitworth Bros. Storage Company (Whitworth Bros.) (Complaint, Pagragraph 6). From 1955 to 1980 for William and from 1955 to 1981 for Ernest, Whitworth Bros. made employer contributions to Central States, Southeast and Southwest Areas Pension Fund (Central States), mistakenly thinking that William and Ernest were employees covered by the Collective Bargaining Agreement. (Complaint, Paragraphs 11 and 19). Had William and Ernest been employees and not employee-owners they would have been entitled to a pension from their contributions. Discovering the mistake, Whitworth Bros. requested that Central States return the money mistakenly con-

tributed on behalf of William (Complaint, Paragraphs 11 and 20). The amounts contributed on behalf of William and Ernest were approximately $9,000 from 1955 through 1974 and $11,000 from 1975, the effective date of ERISA, through 1980 for William and 1981 for Ernest (Complaint, Paragraphs 10 and 19). Central States refused to return most of the money contributed on behalf of William, but did return the money contribution on behalf of him from November 11, 1979 through March 1, 1980, less than four months of contributions out of 25 years of contributions. (Complaint, Paragraphs 12 and 20). Despite the fact that neither William nor Ernest are eligible to receive a pension because they are co-

owner-employees, and despite the fact that Central States has refused to return most of the money contributed on behalf of William, the Central States continued to bill Whitworth Bros. from August, 1981 through May, 1983 for $1,701.86 for Whitworth Bros.' contribution on behalf of Ernest and threatened Whitworth Bros. with legal action or collection proceedings if payment were not made (Complaint, Paragraphs 26 and 27).

Alleging that Central States' refusal to return the Whitworth Bros.' contributions on behalf of William pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii) is arbitrary and capricious and violates Central States' fiduciary duties under ERISA and 29 U.S.C. § 1104(a), Whitworth Bros. sued Central States in Federal District Court

for return of the money. Return of the money contributed by mistake since 1975, ERISA, the effective date of ERISA was sought pursuant to federal law under ERISA, Count One; return of money prior to 1975, ERISA, was sought pursuant to a pendent state cause of action, Complaint, Count Two; Whitworth Bros. also sought a declaratory judgment that it does not have to make contributions that will not result in a pension and which Central States may not voluntarily return on behalf of Ernest, Complaint, Count Three.

Central States moved to dismiss the Complaint for lack of jurisdiction or failure to state a claim under Federal Rule 12(B)(1) or 6. The District Court granted the motion (Page 29 in Appendix to Petition).

The Court of Appeals for the Sixth Circuit considered three bases as to whether the District Court had jurisdiction of Whitworth's claim; (1) as an express action authorized in ERISA; (2) as an action implied from the terms of the statute; (3) as an action arising under federal common law. The Court found in the negative on points (1) and (2) and affirmatively on point (3). Central States applied for a rehearing "en banc" which was denied, followed by its Petition herein.

SUMMARY OF ARGUMENT FOR NOT GRANTING THE WRIT

The writ should be denied for the following reasons:

(I) The decision of the Sixth Circuit follows principles enunciated by this Supreme Court on the issue of a federal common law remedy.

(II) While the decision below does conflict with that of the Eleventh Circuit Court of Appeals on the issue of "federal common law remedy", the conflict that exists in the Circuits, on the issue of "federal common law remedy", is premature for consideration in this Court on this point. Further, Certiorari was denied in a similar case

in January, 1986 on the issue of "implied cause of action".[1]

(III) This case does not adversely affect "the well being of millions of employees" as suggested by Central States. It does, however, prevent Central States: from unjustly enriching itself with Whitworth's money mistakenly given and received; from acting arbitr-

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[1] Award Service, Inc. v. Northern California Retail Clerks Unions, 763 F.2d 1066 (9th Cir. 1985). cert. denied January 1986, 106 S. Ct. 850). The decision, allowing the remedy of restitution to an employer, was based on a finding of "implied" cause of action not "federal common law remedy". Thus, the spirit but not the letter of its holding conflicts with Dime Coal Co., Inc. v. Combs, 796 F.2d 394 (11th Cir. 1986), and with the Sixth Circuit Whitworth finding on "implied" cause of action. Attention is respectfully directed to Respondent's Cross Petition filed herein for a discussion of "implied cause of action".

arily and capriciously and refusing to refund the money belonging to Whitworth; and from legitimizing its unjust enrichment by denying Whitworth access to the courts under ERISA. This case merely holds that the employer can seek a refund of monies mistakenly contributed on behalf of an employee for whom the pension fund will not have to fund a pension. This is not a case that needs review on the point raised. If however this Court should decide to review this issue, it should review all related issues and grant the Cross Petition filed contemporaneously herewith.

(I) RECOGNITION OF FEDERAL COMMON LAW RESTITUTION IN THIS ERISA CASE IS CONSISTENT WITH SUPREME COURT HOLDINGS IN SIMILAR CASES

To suggest, as does Central States, that the "decision in the present case conflicts in principle with the decision of this Court in Northwest Airlines"[2] and other Supreme Court cases is wrong. The Northwest Airlines case involved an employer guilty of discrimination under the Equal Pay and Civil Rights Acts. The employer, Northwest, sought contribution from the Union as a joint tort feasor, in anticipation of a large potential judgment in favor of its employees. Neither

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[2] Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, et al., 451 U.S. 77 (1981).

statute there suggested or inferred contribution among joint tort feasors as a remedy, unlike ERISA in the instant case which expressly authorizes the "refund" of mistakenly paid contributions. (§ 403(c)(2)(A)(ii). Similarly, Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 650, 1981 cited by petitioners, also holds that there is no federal right to contribution among anti-trust co-conspirators. The employer Whitworth, unlike Northwest Airlines, has not been guilty of wrongful conduct. Central States, on the other hand, has acted wrongfully, "arbitrarily and capriciously" to unjustly enrich itself. This Court in Northwest Airlines recognized two ways

in which a federal cause of action may be implied, saying:

> "Even though Congress did not expressly create a contribution remedy, if its intent to do so may fairly be inferred from either or both statutes, an implied cause of action for contribution could be recognized on the basis of the analysis used in cases such as Cort v. Ash. . .Cannon v. University of Chicago. . .Second, a cause of action for contribution may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct." Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, et al., 451 U.S. 77 (1981). (emphasis added)

Whitworth Bros. in its cross petition argues that the first method described in Northwest Airlines applies because Congress did imply that employers should be able to sue to recover money mistakenly paid on behalf of employees pursuant

to § 403(c)(2)(A)(ii). The Court of Appeals for the Sixth Circuit held that the second method described in Northwest Airlines applied.

The other cases cited by Central States are also clearly distinguishable. For example, City of Milwaukee v. State of Illinois, et al., 451 U.S. 304 (1981) held that an early federal common law cause of action to abate a nuisance against a water polluter, was no longer necessary because Congress had passed the Water Pollution Act which specifically established criteria as to what was a nuisance and thus dealt with the problem. The earlier decided Milwaukee case[3]

[3] State of Illinois v. City of Milwaukee, Wisconsin, et al., 406 U.S. 91 (1972).

was like Whitworth in that "nuisance" at common law was as well recognized as "unjust enrichment".

Unlike the Whitworth case, however, the Water Pollution Act obviated the Court's need to apply the common law theory by replacing the common law nuisance with a more specific statutory nuisance cause of action. In ERISA, Congress has not replaced an employer's claim for unjust enrichment with anything, but has acknowledged it in § 403(c)(2)(A)(ii).

In Massachusetts Mutual v. Russell, 105 S.Ct. 3085 (1985) this Court refused to imply an ERISA cause of action to an employee against the trustees of a plan for extra contractual damages for termination for five months of benefits that

were later refunded. There the employee received the benefits she was entitled to under the plan, refund of the terminated benefits. She wanted a remedy not authorized by ERISA, compensatory and punitive damages. Here Whitworth Bros. merely seeks to receive what ERISA permits it to receive under § 403(c)(2)(A)(ii), a refund of the money mistakenly contributed on behalf of its owner-employee. Section 403(c)(2)(A)(ii) creates the remedy. Federal common law allows Whitworth Bros. to bring suit to enforce the statutory remedy in the face of the arbitrary and capricious refusal by the Central States to refund the money. The Russell decision is therefore in no way contrary to the Sixth

Circuit Court of Appeals' recognition of the old remedy of restitution. Whitworth Bros. is not seeking to create a federal remedy, it is seeking to enforce the federal remedy created in § 403(c)(2)(A)(ii).

(II) CONFLICT OF TWO CIRCUITS IS PREMATURE FOR REVIEW ONLY OF FEDERAL COMMON LAW ISSUE.

It has been said that Congress intended the Courts to fashion a body of federal common law to govern ERISA suits.[4]

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[4]See Scott v. Gulf Oil Corp., 754 F.2d 1499, 1502 (9th Cir. 1985) (Congress intended courts to fashion a body of federal common law to govern ERISA suits); Van Orman v. American Ins. Co., 680 F.2d 301, 311 (3rd Cir. 1982); Murphy v. Heppenstall Co., 635 F.2d 233, 237 (3rd Cir. 1980) (citing Senator Javits' remarks as support for congressional authorization of the evolution of federal common law of pension plans), cert. denied, 454 U.S. 1142 (1982); Teamsters Pension Trust Fund v. Philadelphia Fruit Exch., 603 F. Supp. 877, 880 (E.D. Pa. 1985) (employees claims based on federal common law of pension funds); Taylor v. Bakery & Confectionary Union & Indus. Int'l. Welfare Fund, 455 F.Supp. 816, 818-19

With only two Circuits in conflict on the issue of federal common law as it applies to employers' right to sue for restitution of mistakenly paid funds,[5] it is premature to review this issue. However, if this Court should decide not

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[4] (continued)
(E.D.N.C. 1978) (courts are to create federal common law); H.R. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974), reprinted in 3 Legislative History, supra note 2 at 4277, 4594 (all civil actions by participants and beneficiaries "are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of Labor-Management Relations Act of 1974"); 120 Cong. Rec. 29,942 (1974), reprinted in 3 Legislative History, supra note 2, at 4771 (statement of Senator Javits) (body of federal substantive law will be developed). See 54 Fordham Law Review 225, 242 (Scanlon), wherein the above analysis is set forth. Also see opinion of Sixth Circuit in Whitworth (pages 24a-28a, Appendix to petition).

[5] Dime Coal Company, Inc. v. Combs, 796 F.2d 394 (11th Cir. 1986); Whitworth v. Central States (subject). cf. Teamsters Local 639 - Employees Health Trust v. Cassidy Trucking, Inc.,

to wait for other Circuits to rule, the review of the "implied cause of action" issue raised in Respondent's Cross Petition would permit this Court to review the entire problem of "unjust enrichment" and the refund of mistaken employer contributions.

(III) THERE IS NO EVIDENCE OF FINANCIAL ADVERSITY TO THE WELL-BEING OF THE PENSION FUND. ONLY THE WELL-BEING OF WHITWORTH IS AFFECTED BY THE LOWER COURT'S DECISION

To suggest as does Central States that the decision in this case undermines the "financial soundness" of a "substantial" number of plans and the "security of

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[5](continued)
646 F.2d 865, 868 (4th Cir. 1981) in which the Fourth Circuit allowed an employer's action based on restitution in the presence of equitable factors so dictating.

millions of employees and their dependents" is hypocritical hyperbole. There is no evidence that refunds of the money that Whitworth Bros. mistakenly paid on behalf of William and Ernest will "undermine" any pension plan. If the Central States' plan has no obligation to give pension benefits to Ernest and William Whitworth, the refund of their money should not affect the plan. Retention of such monies unjustly enriches the plan.[6] The ironic wrong of denying Whitworth Bros. a suit in this case is illustrated by Central States' pursuit, and threat of collection proceedings, of more contri-

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[6] Peckham v. Board of Trustees, et al., 719 F.2d 1093 (10th Cir. 1983).

butions on behalf of brother Ernest Whitworth. This was after Central States had refused to return all but four months of 25 years of contributions of brother William Whitworth who was not entitled to a pension. To deny Whitworth Bros. a right and a remedy would put Central States in a position to demand money to which it is not entitled and not have to return it. Owner employees of small businesses could be misled and bilked of funds with no judicial redress.

CONCLUSION

In, summary, the decision of the Sixth Circuit as to a federal common law cause of action is not inconsistent

with the pronouncements of this Court.[7] ERISA was not intended to be used as a shield, as urged by Petitioner Central States, to justify common law wrongdoing in the form of wilful, arbitrary and capricious unjust enrichment. The Court of Appeals acknowledged this. Its decision recognized: the need to prevent unjust enrichment; and the fact that Congress intended federal common law to aid in the enforcement of ERISA. For Central States to piously posture about the "well being and security of millions" while they arbitrarily, capriciously and inten-

[7]Recent Supreme Court cases holding that ERISA must be viewed in light of the common law are discussed in detail in Respondent's Cross Petition at pages 29 - 33.

tionally undermine the well-being and security of the Whitworth brothers and others like them is hypocrisy at best and unjust immorality at worst.

For the above reasons, the Sixth Circuit finding of common law cause of action should stand and the Central States Petition for Certiorari should be denied.

Respectfully submitted,

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No. 86-481 (3)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Petitioners,

v.

WHITWORTH BROS. STORAGE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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No. 86-481

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Petitioners,

v.

WHITWORTH BROS. STORAGE COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF

The petitioners Central States, Southeast and Southwest Areas Pension Fund ("the Pension Fund"), the Pension Fund's Board of Trustees and Executive Director (all petitioners hereinafter collectively "Central States") respectfully submit this reply brief to demonstrate that the arguments raised by the respondent Whitworth Bros. Storage Company ("Whitworth") in its Brief in Opposition to Petition for a Writ of Certiorari ("Opp.") are entirely without merit.

First, Whitworth admits that the decision of the Sixth Circuit in the present case conflicts with the decision of the Eleventh Circuit in *Dime Coal Company, Inc.* v. *Combs*, 796

F.2d 394 (11th Cir. 1986). Nevertheless, stating merely that "only two Circuits [are] in conflict," Whitworth asserts that review by this Court of the question presented — whether an employer has a federal-common-law action for restitution of contributions made, allegedly by mistake, to an employee benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.*[1] — would be "premature." Opp. at page 16. This Court, however, has not required that a conflict involve three or more federal courts of appeals in order for an issue to warrant review. To the contrary, the Court frequently has granted a writ of certiorari to resolve a conflict between two circuits on an important issue. *See, e.g., Celotex Corp.* v. *Catrett*, ____ U.S. ____, 106 S.Ct. 2548, 2551 (1986); *United States* v. *Hughes Properties, Inc.*, ____ U.S. ____, 106 S.Ct. 2092, 2096 (1986). Moreover, prompt resolution by this Court of the present conflict is critically important to ERISA-governed multiemployer employee benefit plans which, as a result of the conflict, are currently subject to disparate standards depending upon the circuit within which the issue is raised.[2]

Second, Whitworth has not disputed the validity of the decisions of this Court with which the Sixth Circuit's decision

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[1] It should be noted that Whitworth has not directly addressed this issue, but rather has asserted that the remedy it seeks is implied by ERISA § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii), and that "[f]ederal common law allows Whitworth Bros. to bring suit to enforce the statutory remedy. . . ." Opp. at page 14. Whitworth does acknowledge, as it must, that the Sixth Circuit rejected the "implied right of action" argument in section II.B. of its opinion in this case. Opp. at page 5.

[2] This is not merely an academic point. The petitioner Pension Fund operates in the Eleventh Circuit, *see Sharron* v. *Amalgamated Insurance Agency Services, Inc.*, 704 F.2d 562 (11th Cir. 1983) (the Pension Fund's subsitution as defendant is noted in n.1 of the opinion), and the United Mine Workers of America Health and Retirement Funds, whose trustees were the defendants in *Dime Coal*, operate in the Sixth Circuit, *see Norman* v. *United Mine Workers of America Health and Retirement Funds*, 755 F.2d 509 (6th Cir. 1985).

in the present case conflicts in principle,[3] and its attempt to distinguish these decisions is based upon an apparent misunderstanding of ERISA and its history. Whitworth claims to be different from the parties who unsuccessfully asserted federal-common-law remedies in *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, 451 U.S. 77 (1981), and *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), stating that, unlike those parties, Whitworth "has not been guilty of wrongful conduct," whereas "Central States, on the other hand, has acted wrongfully. . . ." Opp. at page 10. Not only has Whitworth failed to show why such a distinction warrants a different result, but Whitworth also is simply wrong, as a matter of law, in its contention that Central States has acted wrongfully. To the contrary, as Central States shall demonstrate herein, for nearly half of the time ERISA has been in effect, an employee benefit fund faced with a request for a return of contributions such as made by Whitworth would have acted *wrongly* — that is, contrary to the statute — only *if it gave the refund.*

Ever since ERISA was enacted, § 403(c)(1), 29 U.S.C. § 1103(c)(1), has provided that, except as specifically and narrowly allowed, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."[4] One such limited exception which was

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[3] Those cases stand for the principle that the federal courts may formulate federal common law only under limited circumstances which do not exist when Congress has enacted a comprehensive legislative scheme.

[4] Similarly, ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), which with § 403 is contained in ERISA's Part 4 regarding fiduciary duties, provides in pertinent part that

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and

included in ERISA as it was originally enacted was § 403(c)(2)(A), 29 U.S.C. § 1103(c)(2)(A), which provided: "In the case of a contribution which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution."[5] It has long been recognized that a mistake concerning whether an individual is an employee covered by the applicable collective bargaining agreement, and thus whether his employer is required to make contributions to a benefit plan on his behalf, is a mistake of law, not fact. *See, e.g., Martin* v. *Hamil*, 608 F.2d 725 (7th Cir. 1979). Thus, from 1975 through 1980, a refund by Central States of the contributions requested by Whitworth was absolutely prohibited and would have constituted a violation of the fiduciary duties imposed under ERISA; a refusal of such a request, therefore, could hardly be characterized as wrongful. ERISA, as amended by MPPAA, currently *permits* the return of such contributions under certain circumstances but does not require a refund or make a denial of a request for a refund wrongful or actionable.

Finally, both parts of Whitworth's dual argument that "[t]here is no evidence that refunds of the money that Whit-

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(ii) defraying reasonable expenses of administering the plan. . . .

[5] Since the amendment of ERISA by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), ERISA § 403(c)(2)(A)(i) similarly has provided: "In the case of a contribution . . . made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution. . . ." 29 U.S.C. § 1103(c)(2)(A)(i). MPPAA also added to ERISA § 403(c)(2)(A) a new subsection (ii), which provides in pertinent part that in the case of a contribution "made by an employer to a mulitemployer plan by mistake of *fact or law* . . . , paragraph (1) shall not prohibit the return of such contribution . . . to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake." 29 U.S.C. § 1103(c)(2)(A)(ii) (emphasis added).

worth Bros. mistakenly paid on behalf of William and Ernest will 'undermine' any pension plan," Opp. at page 18, and that Central States has "undermine[d] the well-being and security of the Whitworth brothers,"[6] Opp. at page 21, are flawed. Because the district court made its decision as a matter of law in response to the parties' briefing on Central States' motion to dismiss, no evidence on *any* matter was or needed to be considered. Further, the suggestion that the availability of an employer's restitution remedy would benefit employees improperly confuses the identity of the employer with the identities of its employees.[7] Moreover, Whitworth's contentions on behalf of two specially situated individuals cannot compare in importance to the congressionally recognized need to protect and preserve employee benefit plans in the interest of their participants and beneficiaries.

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[6] Throughout its Brief in Opposition, Whitworth repeatedly asserts that William and Ernest Whitworth are not entitled to pensions. Not only is such an allegation absent from the complaint in this action, but it is irrelevant to employer Whitworth's attempt to force a refund of contributions allegedly made by mistake.

[7] Whitworth at page 14 of its Cross Petition for a Writ of Certiorari more directly states: "In this instance the employer (Whitworth Bros.) is not suing as an employer to obtain money for corporate use, but on behalf of the employee-co-owners (Whitworth brothers) to return to them their money paid on the mistaken belief that they, as employees, were covered by the collective bargaining agreement." The asserted representational relationship is not alleged in the complaint in the present case and is irrelevant as to whether a cause of action exists generally for an employer to recover contributions made allegedly by mistake.

CONCLUSION

For the foregoing reasons and for the reasons stated in Central States' Petition for Certiorari, this Court should grant the petition and review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this action.

Respectfully submitted,

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